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No. 98-1564

In the Supreme Court of the United States

DOROTHY MACKEY, PETITIONER

v.

DAVID W. MILAM, TRAVIS ELMORE, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals lacked authority to grant respondents' petition for permission to appeal under 28 U.S.C. 1292(b).

2. Whether the court of appeals erred in applying state law to determine that the individual respondents acted within the scope of their employment for purposes of certification under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 154 F.3d 648. The orders of the district court (Pet. App. B1-B16, C1-C8, and D1-D2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1998. The petition for rehearing was denied on October 27, 1998 (Pet. App. E1-E2). On January 15, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 26, 1999, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), ch. 753, § 401, 60 Stat. 842, confers jurisdiction on the district courts to hear tort suits arising out of the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (Supp. III 1997). The FTCA makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

In turn, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, provides individual government employees with an immunity from personal liability by substituting the United States for them as the defendant if the Attorney General or her delegate certifies that the employees were acting within the scope of their employment. 28 U.S.C. 2679(b) and (d); see generally *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995). Once the United States has been substituted as the defendant, the case proceeds as an action under the FTCA. 28 U.S.C. 2679(d)(4).

2. Petitioner was an Air Force officer assigned to Wright-Patterson Air Force Base in Dayton, Ohio. She alleges that, between September 1991 and August 1992, she was repeatedly subjected to sexual harassment by two Air Force officers who supervised her: Col. David

W. Milam and Lt. Col. Travis E. Elmore. Pet. App. B1-B3. In December 1994, she sued Milam and Elmore in state court, alleging intentional infliction of emotional distress, common law sexual harassment, assault and battery, tortious interference with contractual relations, and sex discrimination (hostile environment), all under Ohio law. *Id.* at B4-B5. Respondents ultimately moved to dismiss the action based, among other things, on the intramilitary immunity doctrine, which is predicated on the consideration articulated in *Feres* v. *United States*, 340 U.S. 135 (1950). The state court denied that part of the motion. Pet. App. C3.

In 1996, the United States Attorney certified that the conduct alleged in the complaint, if it took place, would fall within the scope of Milam's and Elmore's employment within the meaning of the Westfall Act. C.A. App. 105, 106. The case was thus removed to federal court in May 1996, and the United States was substituted as the defendant.

On December 11, 1996, the district court held that the United States had been improperly substituted as the defendant because Milam and Elmore had not been acting within the scope of their employment. Pet. App. B1-B16. Following settled Westfall Act precedent, the court looked to state law in resolving the parties' scope-of-employment dispute. The court concluded that Milam's and Elmore's conduct could not be viewed as facilitating or promoting the business of the United States, and that, under Ohio law, they were thus necessarily acting outside the scope of their employment. *Id.* at B13. The court then remanded the case to state court. *Id.* at B14-B16. But see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995) (indicating that Westfall Act requires district court to retain jurisdiction over case even when court holds that federal employee had

not acted within scope of employment and therefore resubstitutes employee as defendant).

The government moved under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment on several grounds. In May 1997, the district court granted the motion in part and denied it in part. The court first adopted the state court's analysis in denying intramilitary immunity, an issue that the district court had not addressed in its original order. Pet. App. C3. Second, apparently misunderstanding the government's contention that the court had *misapplied* Ohio law in deciding the scope-of-employment issue, the court reaffirmed that Ohio law *governed* the scope-of-employment issue, a point that neither party in fact disputed. *Id.* at C3-C4. Third, the court vacated its remand order and agreed to a hearing on the facts alleged in the complaint. It explained that it was "not inclined to reconsider the merits of its determination of the scope of employment at issue"—which had been based on the assumed truth of the allegations in the complaint—but would "give consideration to the determination of the truth of the factual allegations set forth in the Plaintiff's complaint upon which its determination of the scope of employment was based." *Id.* at C6. Thus, the court vacated the portion of its order resubstituting Milam and Elmore and added that "[i]f the Plaintiff proves the allegations contained in her complaint, then the Colonels will be resubstituted as Defendants and the case will be remanded to state court." *Id.* at C7.

3. a. Respondents filed an appeal from both the original order and the order on reconsideration.[1] On

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[1] When the district court initially held that the individual officers were acting outside the scope of their employment, it

September 30, 1997, while the appeal was pending, respondents asked the district court to certify an interlocutory appeal under 28 U.S.C. 1292(b) on the following question: "Whether under Ohio law, a supervisor who engages in sexual harassment of a subordinate employee is acting within the scope of his employment." See Pet. App. D1.

Some months later, on April 22, 1998, the district court certified its May 1997 order for interlocutory appeal. See Pet. App. D1-D2. Respondents then filed a petition for permission to appeal with the court of appeals within the 10-day period provided by 28 U.S.C. 1292(b).[2] Petitioner filed no opposition. The court of appeals granted the petition when it issued its decision on the merits. See Pet. App. A5.

b. On the merits, the court of appeals first noted that, under the Westfall Act, whether an employee is acting within the scope of his employment is determined by the law of the State where the conduct occurred. Pet. App. A6. The court then analyzed decisions of the Ohio Supreme Court and concluded that the district court had been mistaken in its interpretation of Ohio law. Relying on *Kerans* v. *Porter*

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resubstituted them as defendants in place of the United States. But when it ordered the *factual* scope-of-employment hearing, it vacated that resubstitution of the individual officers, even though it was adhering to its conclusion that the scope-of-employment certification was *legally* improper. Because of the uncertainty about who the proper defendants were at that point, the government filed a notice of appeal on behalf of both the officers and the United States.

[2] Petitioner is correct (see Pet. 7, 14) that the petition does not appear in the court of appeals docket, but the petition was in fact filed with the court. Indeed, the court's opinion, which grants the petition, itself indicates that one was filed. See Pet. App. A5.

Paint Co., 575 N.E.2d 428 (Ohio 1991), the court observed that, if an employee is capable of sexually harassing another employee because the employer has vested authority or apparent authority in him, Ohio law deems the harasser's actions to fall within the scope of his employment. Pet. App. A6-A7. Here, the court of appeals concluded, Milam and Elmore's conduct, as alleged in the complaint, fell within the scope of their employment for several reasons: they had direct supervisory power over petitioner; most of the alleged acts occurred during working hours on the base; and they were able to accomplish the alleged harassment because the Air Force had put them in a supervisory position. *Id.* at A8. The court thus reversed and remanded for resubstitution of the United States as a defendant. The court further suggested that petitioner's allegations, which "go 'directly to the "management" of the military,'" might be barred by the *Feres* doctrine. Pet. App. A9 (quoting *Skees* v. *United States*, 107 F.3d 421, 424 (6th Cir. 1997)).

Judge Cole dissented, arguing that the majority had misconstrued Ohio law, the applicability of which he did not question. Pet. App. A10-A18.

c. Petitioner sought rehearing and suggested rehearing en banc. Pet. App. E1-E2. Her sole argument was that, under Ohio law, the individual respondents were acting outside the scope of their employment. She did not object to the court's premise that Ohio law governed the dispute or to the court's exercise of jurisdiction under Section 1292(b).

ARGUMENT

1. The court of appeals addressed and correctly resolved a straightforward dispute between the parties about the proper interpretation of Ohio *respondeat*

superior law. The petition, however, presents two issues that petitioner did not raise below and the court of appeals did not address (see Pet. 14 n.12; p. 10, *infra*): whether there was a procedural flaw in the documents associated with certification of a question for interlocutory appeal, and whether (as all assumed in the proceedings below) Ohio law governs the proper disposition of the parties' scope-of-employment dispute. Those issues are not proper candidates for the exercise of this Court's certiorari jurisdiction. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); see also *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal quotation marks omitted). The petition should be denied for that reason alone.

2. Even if the court of appeals had addressed the issues that petitioner presents here for the first time, those issues would not warrant this Court's review.

a. Petitioner contends (see Pet. 14 n.12) that respondents' petition for permission to appeal should have been denied on procedural grounds. Pet. 11-19. She reasons (Pet. 16-17) that a district court's certification under Section 1292(b) must be physically part of the order resolving the issue as to which an appeal is sought, and she concludes that the district court's issuance here of a separate order certifying the issue for appeal was inadequate. Petitioner cites no judicial authority to support that argument and indeed identi-

fies no other case in which the issue has even arisen.[3] Thus, even if this issue had been litigated in and decided by the court of appeals, it still would not warrant this Court's review.

Moreover, petitioner's argument is without merit. Under Section 1292(b), when a district court finds that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the court "shall so state in writing in such order." 28 U.S.C. 1292(b). Rule 5(a) of the Federal Rules of Appellate Procedure further provides that if the original order does not contain such a certification, the "order may be amended to include the prescribed statement at any time." The requirements of Section 1292(b) and Rule 5(a) are fully satisfied by the issuance of a separate order, such as the one at issue in this case (Pet. App. D1-D2), that certifies the original order for interlocutory review under Section 1292(b). The separate order amends the original order in the necessary manner: it identifies the original order, keeps it in full effect, and modifies it by certifying the issue for appeal. The rules do not require, as petitioner appears to suggest (Pet. 16-17), that the court reissue its original order verbatim with the certification physically attached.

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[3] The only authority that petitioner does cite in support of her position—a treatise—notes that "there is no case authority directly on point." 19 *Moore's Federal Practice* § 203.32[1], at 96.1-97 (3d ed. 1999). (Although petitioner also cites 16 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3929, at 376 (2d ed. 1996), and *Baldwin Country Welcome Center* v. *Brown*, 466 U.S. 147, 161 (1984) (Stevens, J., dissenting), see Pet. 18, those sources do not even address the question presented in the petition.)

Petitioner also argues that respondents' petition for permission to appeal was untimely on the ground that it was filed more than ten days after the May 1997 order that was certified for interlocutory appeal. Pet. 17. That is incorrect. "The ten-day limit for seeking permission to appeal runs from entry of the district court order certifying the underlying order for appeal, not from entry of the underlying order itself." Charles Alan Wright, et al., *Federal Practice & Procedure* § 3929, at 394 (2d ed. 1996). Here, the petition was filed within ten days after entry of the order of April 22, 1998, which amended the May 1997 order and certified the issue for appeal. Thus, the petition was filed within ten days after entry of the May 1997 order *as amended by the separate order certifying the issue for appeal.* The court of appeals was therefore authorized to grant the petition for permission to appeal, and it properly exercised jurisdiction under Section 1292(b).[4]

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[4] In a footnote (Pet. 18 n.15), petitioner suggests that the court of appeals "may have" lacked jurisdiction under Section 1292(b) on the theory that the government's motion for certification referred to the May 1997 reconsideration order but not the December 1996 order. That suggestion is without merit. Although the motion to certify referred only to the reconsideration order, that order reiterated the court's earlier holding that the conduct alleged in the complaint, if proven, would fall outside the scope of Milam's and Elmore's employment as a legal matter. See Pet. App. C6-C7. Petitioner separately contends that the district court lacked jurisdiction to entertain the motion to certify the May 1997 order on the ground that respondents' notice of appeal took that order up to the court of appeals. Pet. 17 n.14. But a district court has jurisdiction over an order on appeal to the extent the court acts in furtherance of appellate jurisdiction. See, *e.g.*, *In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991); *Cochran* v. *Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981), cert. denied, 454 U.S. 1152 (1982). Here, the government asked the district

b. On the merits, petitioner contends (Pet. 20-29) that substantive federal law, rather than the law of the State in which the conduct occurred, should provide the rule of decision for determining scope of employment for purposes of the Westfall Act. That argument has been waived, and it is not properly before this Court. Petitioner did not argue in the court of appeals that federal law provides the rule of decision for scope-of-employment purposes. Instead, she expressly "agree[d] that the District Court was required to look to Ohio law to determine whether Messrs. Milam and Elmore were acting within the scope of their employment." Mackey C.A. Br. 16. This Court does not generally grant certiorari to consider legal theories that the complaining party disavowed below and that the court of appeals did not consider. See, *e.g.*, *United States* v. *Williams*, 504 U.S. at 40-45.

Even if petitioner had not waived her present argument, moreover, the issue would not warrant this Court's review. Petitioner cites no judicial precedent supporting her position, and she herself concedes (Pet. 20, 22) that the courts have consistently held that state law provides the rule of decision for scope-of-employment purposes. See, *e.g.*, *Garcia* v. *United States*, 62 F.3d 126, 127 n.8 (5th Cir. 1995) (en banc per curiam opinion) (citing cases).

That unanimously held view is correct, and it follows logically from this Court's decision in *Williams* v. *United States*, 350 U.S. 857 (1955). The FTCA makes

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court to certify the scope-of-employment issue under Section 1292(b) to eliminate any doubt about the jurisdiction of the court of appeals to address that issue. (For the reasons discussed in our appellate brief (at 12-16), the court of appeals independently had such jurisdiction under the collateral order doctrine.)

the United States liable for the acts of employees within the scope of employment in circumstances where a private person "would be liable * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).[5] Following that plain language, the *Williams* Court held that state *respondeat superior* law governs scope-of-employment issues when a plaintiff sues the United States directly under the FTCA. See 350 U.S. at 857. Similarly, state law should govern such issues under the Westfall Act when federal employees are sued and seek to have the United States substituted as a defendant under the FTCA. It would make little sense to have two potentially inconsistent sources of *respondeat superior* law governing the twin inquiries under the Westfall Act and the FTCA. The circumstances in which the United States is substituted

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[5] The FTCA clarifies that "'[a]cting within the scope of * * * employment,' in the case of a member of the military * * *, means acting in the line of duty." 28 U.S.C. 2671. That provision confirms that the same scope-of-employment inquiry applies to military personnel as to civilian federal employees. In particular, despite petitioners' contrary contention (Pet. 24-28), the phrase "line of duty" does *not* incorporate the meaning it had developed in the context of claims by military personnel for benefits from the United States. See *United States* v. *Campbell*, 172 F.2d 500, 502-503 (5th Cir.), cert. denied, 337 U.S. 957 (1949); see also *United States* v. *Eleazer*, 177 F.2d 914, 918 (4th Cir. 1949), cert. denied, 339 U.S. 903 (1950). That is in fact what the United States argued in *Williams* v. *United States*, *supra*, despite petitioner's out-of-context quotation (Pet. 26) of a sentence in the government's brief. See Brief for the United States at 14-23, *Williams* v. *United States*, *supra* (No. 24). The United States separately argued in *Williams* that scope of employment under the FTCA—for all purposes, military and civilian—should be determined under federal, not state, law. *Id.* at 35-36. But this Court of course rejected that position in *Williams* itself, which, as petitioner acknowledges (Pet. 21), was a military "line of duty" case.

as a defendant because its employees have acted within the scope of employment should be, for these purposes, the same circumstances in which the acts of those employees could satisfy the *respondeat superior* principles necessary (though not sufficient) to establish the liability of the United States under the FTCA once it *is* the defendant.[6]

Finally, petitioner suggests (Pet. 21-22 n.17) that *Williams* v. *United States* was incorrectly decided. But there is no need for this Court to reexamine that decision so long as the current unanimity in the case law persists. In any event, even if issues concerning that decision might someday be worthy of further review, this Court should wait for a case in which those issues were actually litigated and decided in the lower courts before they are presented in a petition for certiorari. As noted, this is not such a case.[7]

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[6] Petitioner intimates (Pet. 28-29 & n.22) that application of state law, rather than federal law, would be somehow unfair because the United States, if substituted as the defendant, may advance defenses unavailable to individual defendants. See also Pet. App. A9; p. 3, *supra*. Any such argument, however, would quarrel not with the proper source of *respondeat superior* law, but with the substantive defenses that might be available to the United States on the merits, an issue that is not presented in this petition. See Pet. i (Questions Presented).

[7] Petitioner notes (Pet. 23) that, in *Gutierrez de Martinez*, the plurality opinion referred to the scope-of-employment determination as a "federal question." 515 U.S. at 435. The plurality did not, however, suggest that a uniform body of federal law supplies the rule of decision for such determinations; that issue was not before the Court. Instead, the passage in question makes the quite different point that federal law requires such determinations to be made and thereby satisfies Article III "arising under" jurisdiction. See *ibid.* It is common, however, for federal law to incorporate

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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substantive state law in providing rules of decision. See, *e.g.*, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981).

This Court's recent Title VII decisions in *Burlington Indus., Inc.* v. *Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275 (1998), are also inapposite. Cf. Pet. 21-22 n.17, 28. Because Congress "directed federal courts to interpret Title VII based on agency principles," it was necessary to establish a uniform standard "as a matter of federal law" without regard to the law of any particular State. *Ellerth*, 118 S. Ct. at 2265. Petitioner's claims, however, arise under the FTCA and the Westfall Act, which incorporate state law, rather than under Title VII. See *Randall* v. *United States*, 95 F.3d 339, 343 (4th Cir. 1996) (holding that Title VII is inapplicable to uniformed military personnel), cert. denied, 519 U.S. 1150 (1997). For purposes of the FTCA and the Westfall Act, Congress required scope determinations to be made under state law. The federal-law agency rules established in *Ellerth* and *Faragher* are thus inapplicable in Westfall Act cases, except to the extent that state courts rely on them in the future in formulating state law.